

Daniel R. Deutsch

May 12, 2006

**VIA FEDERAL EXPRESS  
AND ELECTRONIC MAIL**

Phyllis Johnson-Ball  
Surface Transportation Board  
1925 K Street, NW  
Washington, DC 20423  
Attn: Finance Docket 34797

RE: New England Transrail, LLC  
Request for Information on Environmental Impacts  
Finance Docket 34797

Dear Ms. Johnson-Ball:

As you know, we are counsel to the Town of Wilmington, Massachusetts (“Wilmington”). We submit this letter in response to the April 7, 2006 letter of Victoria Rutson, Chief, Section of Environmental Analysis (“SEA”), requesting submittal by today of “information on potential environmental impacts, resources or issues concerning” the proposal of New England Transrail, LLC (“NET”) for a construction, acquisition and operation exemption that is pending before the Surface Transportation Board (“Board”) as Finance Docket 34797 (“NET Proposal”).

In its Reply to NET’s Petition for Exemption in this proceeding, Wilmington raised the issues of whether or to what extent the Board has jurisdiction over the NET Proposal and whether state and local site assignment permitting for a solid waste facility are preempted by the Board’s regulations in this case. Several other interested parties also have addressed these issues, including the Massachusetts Department of Environmental Protection (“MADEP”), the “Coalition Parties” (including the National Solid Wastes Management Association and Massachusetts Municipal Association), and the New Jersey Department of Environmental Protection. The Coalition Parties recently petitioned the Board to delay any environmental analysis and to expedite consideration of the parties’ replies, since a decision on jurisdictional issues would promote a more efficient environmental review or obviate the need for it. Wilmington concurs in that petition. As the Board has not yet acted on it, we submit the following comments without prejudice to Wilmington’s position on these jurisdictional issues.

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In support of our comments, we also incorporate by reference the many dozens of comment letters submitted by Wilmington's interested citizens, state and congressional representatives, and the Town itself in this proceeding and in proceedings related to NET's previous project proposal (Finance Docket 34391). Wilmington's submissions have included extensive comments of town officials on issues of water resources, public safety, traffic congestion, air and noise pollution, and the expert technical analyses of GeoInsight, Inc., Wilmington's consulting engineer for the contaminated Olin Chemical property that NET proposes to redevelop.

NET's proposals have been characterized by incremental but fundamental changes in the nature and scale of the project, repeated withholding of information essential to any sound evaluation of environmental impacts, and a persistent absence of critical data. *See New England Transrail, LLC, Petition for Exemption*, STB Finance Docket 34391 (STB served May 3, 2005) ("May 2005 Decision"). Indeed, the Board dismissed the prior NET petition due to incomplete environmental information, including information related to jurisdictional and preemption issues, and found that NET "was not forthcoming." *See* May 2005 Decision, at 4-5. This unusually checkered filing history, and continued gaps in critical information about the project's potential environmental impacts, necessitate a full Environmental Impact Statement ("EIS"). Even more than in the ordinary case, an EIS for the NET Proposal is necessary to ensure that thorough consideration is given to the full range of reasonably foreseeable environmental impacts, consistent with the National Environmental Policy Act, 42 U.S.C. § 4321 ("NEPA"). *City of Grapevine v. D.O.T.*, 17 F.3d 1502, 1503-04 (D.C.Cir.), cert denied, 513 U.S. 1043 (1994) (under NEPA, agency must take a "hard look" at environmental consequences of a decision before allowing a project to proceed).

Federal court decisions and the Board's enabling legislation make clear that an environmental assessment is not tantamount to an EIS but instead is to guide a decision whether to require an EIS. *See Sierra Club v. Marsh*, 769 F.2d 868, 875 (1<sup>st</sup> Cir. 1985); 49 CFR §1105.7(d). In this case, the Section of Environmental Assessment generated not only an Environmental Assessment ("EA") but also a Post-Environmental Assessment ("Post-EA") in connection with NET's prior proposal. Moreover, the Post-EA was invalidated because of NET's many factual omissions. This procedural history underscores the need for an EIS. Rehashing the Post-EA from the prior proceeding would not be appropriate or sufficient to satisfy the requirements of NEPA.

This is especially so because NET continues to modify the proposed project. The NET Proposal is substantially different from earlier project iterations. Among other changes, it proposes more rail spurs and significantly more excavation of the heavily contaminated soil at the Olin site. The Environmental Protection Agency ("EPA") cites this extensive excavation in particular as necessitating an EIS. *See* EPA Comments dated May 10, 2006 (proposing a delay in any review pending completion of relevant portions of a remedial investigation/feasibility study and urging SEA to require a full EIS). Such excavation and permanent foundations would

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impede the ongoing investigation and remediation of the site, despite NET's protestations to the contrary.

Under NEPA, it is not open to the SEA to rely on assurances of NET that the project would not impede investigation or remediation, or on any purported financial incentive of NET (cited in the Post-EA) to avoid such impairment in order to minimize CERCLA liability. Nor may the agency give NET the benefit of a doubt on any factual issue relevant to its analysis. To the contrary, as held in decisions cited by the Coalition Parties, when the determination whether a project would result in significant effects is a close call, an EIS should be prepared. Further, NEPA does not allow for a wait-and-see approach to judge potential impacts. The Post-EA would have accepted NET's suggestion to permit construction and operation of the rail and solid waste processing facility, subject to possibly removing or suspending portions of it if it later appeared to impede environmental clean-up. Where, as here, such environmental impacts are reasonably foreseeable, they must be assessed before action is taken on NET's Petition.

The NET Proposal would have another important collateral effect that has not yet been acknowledged. Even if the proposed construction and operation of thousands of feet of new rail lines, concrete foundations, subterranean vaults and huge sprung structures did not impede investigation and remediation – a scenario that is hard to conceive – they would create a new financial incentive for NET or Olin to place environmental remediation structures and operations elsewhere. In particular, such activities more likely would be sited on the remaining 20 acres of the Olin property that NET proposes to acquire (sometimes termed the “undeveloped area”). That area, which lies south of the South Ditch, is to be subject to a conservation restriction. The restriction was proposed by Olin and required by the Wilmington Conservation Commission in its June 2000 Order of Conditions. It was partial mitigation for the destruction of wetlands due to earlier remediation efforts for the overall site, since the destroyed wetlands could not be replicated. The NET Proposal thus almost certainly would degrade the environmental value of immediately adjacent land that is dedicated to be conserved in its natural state, insofar as that is compatible with the overall remediation activities. (Notably, more intensive remediation on the ostensibly protected conservation area also would adversely impact Wilmington residents who live within 1300 feet of the site, since, as the Post-EA noted, many of them reside to the south of the Olin site. This also must be addressed if there is compliance with NEPA requirements.)

Wilmington reiterates its concerns with the proposed solid waste processing facility that NET proposes. Like Congress, Massachusetts courts have determined that solid waste processing and handling have the potential to pose serious threats to human safety and the environment. The courts consistently hold that such activities are inherently threatening, unless they are subject to prior site assignment review of the type required by applicable Massachusetts law. *See* M.G.L. c.111, §§ 150A and 150A ½, and 310 CMR § 16.40. NET's insistence that site assignment review is preempted by STB regulations is mistaken. The parties have briefed this issue extensively in their replies to the NET Petition. However, pursuant to NEPA, environmental review that presumes preemption of the site assignment scheme must fully

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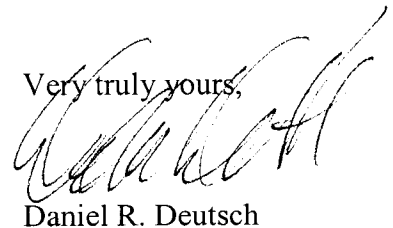
evaluate the implications that a failure to meet those state and local standards would have on human health and the environment. Either way, the NET Proposal cannot lawfully evade a detailed environmental impact review.

NEPA review requires consideration of a project's cumulative effects, including the effect of gradual increases in activities over time. NET has stated that it may "in the future" handle additional commodities, scale up its operations, or develop a break bulk facility on site, depending upon market conditions. The Post-EA identified a break-bulk operation and a possible connection to Massachusetts Bay Transportation Authority ("MBTA") rail lines as scenarios that presented a risk of unknown environmental impacts. NET now has proposed an MBTA connection, though it still is unable to commit to a location for that connection. NEPA review mandates assessment of the environmental impacts of a break-bulk facility, like other contemplated incremental increases in the size or scope of the Proposal to which NET has not yet committed.

For all of the foregoing reasons, and those set forth in the referenced submissions, Wilmington implores the Board to require the submission of a full EIS to address the demonstrably high probability of significant impacts from the NET Proposal.

Thank you.

Very truly yours,

A handwritten signature in black ink, appearing to read "Daniel R. Deutsch", written over the typed name.

Daniel R. Deutsch

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